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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

K.D.,

Plaintiff,

v.

UNITED AIRLINES, INC., *et al.*,

Defendants.

Case No.: 2:17-cv-02825-RFB-NJK

Order

[Docket No. 81]

Pending before the Court is Defendant United Airlines' motion for sanctions. Docket No. 81. The Court has considered Defendant's motion, Plaintiff's response and Defendant's reply. Docket Nos. 81, 89, 92. The Court finds the motion properly resolved without a hearing. *See* Local Rule 78-2. For the reasons discussed below, the Court **GRANTS** in part and **DENIES** in part Defendant's motion for sanctions.

I. BACKGROUND

The instant case alleges two causes of action, battery and negligence, related to a United flight Plaintiff undertook on October 26, 2016. Docket No. 1-1 at 5-9. The Court entered a scheduling order setting the discovery deadline for August 13, 2018. Docket No. 10. Pursuant to the parties' joint request, discovery was extended to November 9, 2018. Docket No. 61.

On August 30, 2018, Defendant filed a motion to compel discovery for Plaintiff's refusal to produce documents in response to Defendant's supplemental request for production. Docket No. 66. On September 24, 2018, the Court granted Defendant's motion to compel in its entirety.

1 Docket No. 75. The Court found that the scope of the requests for production was not overly broad
2 and that the requests were directed at relevant information. *Id.* at 3. The Court also found that
3 Plaintiff's *ex parte* determination of relevancy was an insufficient justification for withholding the
4 information, and that her bare assertion that she sufficiently tried to produce the documents was
5 deficient. *Id.* at 3.

6 Defendant now contends that Plaintiff's responses remain deficient and that Plaintiff
7 continues to withhold documents and information despite the Court's order. Docket No. 81 at 2-
8 3. Defendant asks the Court to sanction Plaintiff pursuant to Rule 37(b) for failure to comply with
9 the Court's order. *Id.* at 3.

10 II. DISCUSSION

11 A. Plaintiff Violated the Court's September 24, 2018, Order

12 Defendant submits that Plaintiff is engaging in a deliberate attempt to conceal information
13 and documents concerning her alleged damages. *Id.* Since the Court's September 24, 2018,
14 motion to compel, Defendant submits there are still twelve outstanding requests for production
15 and four missing supplements to Plaintiff's interrogatory. *Id.* at 6-12

16 In response, Plaintiff submits that she has provided all the documentation in her possession,
17 that she sufficiently outlined her efforts to supplement, and that she believes the Court's order did
18 not specifically compel her to supplement her interrogatories or provide releases. Docket No. 89
19 at 1-2. Plaintiff also submits that she has not shown a pattern of discovery abuse. *Id.* at 2.

20 Plaintiff's response attempts to assert hollow justifications and shift blame for her lack of
21 compliance with the Court's order. Of note, Plaintiff's motion contains no legal authority in
22 support of the argument she presents.¹ *Id.* Moreover, Plaintiff's arguments are underdeveloped
23 and dubious. The Court's order clearly granted, in full, Defendant's motion to compel, which
24 specifically listed the still-outstanding requests for production and interrogatory responses. *See*
25 Docket No. 75. Further, Plaintiff's assertion that she has complied with discovery is simply not
26 true, as Defendant's list of sixteen outstanding requests clearly demonstrates. *See* Docket No. 81.

27 ¹ Pursuant to LR 7-2, "[t]he failure of an opposing party to file points and authorities in
28 response to any motion shall constitute a consent to the granting of the motion."

1 B. Sanctions

2 Defendant asks the Court to sanction Plaintiff under Federal Rule of Civil Procedure 37(b).
3 Docket No. 81 at 3. First, and most significantly, Defendant contends that terminating sanctions
4 are appropriate because Plaintiff is engaged in a deliberate attempt to conceal information and
5 documents at such a level as to threaten the Court’s ability to conduct a trial. *Id.* In the alternative,
6 Defendant asks the Court to order preclusion sanctions for Plaintiff’s claims of emotional distress,
7 loss of earning, and loss of earnings ability. *Id.* Defendant also asks the Court to order Plaintiff
8 to pay its reasonable attorneys’ fees and costs. *Id.*

9 The party requesting sanctions bears the burden of establishing that the opposing party
10 failed to comply with the disclosure requirements. *Silvagni v. Wal-Mart Stores, Inc.*, 320 F.R.D.
11 237, 241–42 (citing *Lodge v. United Homes, LLC*, 787 F. Supp. 2d 247, 258 (E.D.N.Y. 2011)). If
12 a movant satisfies that burden, courts have “particularly wide latitude” in exercising their
13 discretion to impose sanctions. *See, e.g., Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d
14 1101, 1106 (9th Cir. 2001). In exercising that discretion, courts determine first whether the failure
15 to comply with the disclosure requirements was either substantially justified or harmless. Fed. R.
16 Civ. P. 37(c)(1). The party facing sanctions bears the burden of establishing either compliance
17 with the Court’s order or substantial justification or harmlessness. *See, e.g., Yeti by Molly*, 259
18 F.3d at 1107.

19 Here, as noted *supra*, Defendant has shown that Plaintiff failed to provide the required
20 discovery and, therefore, failed to comply with the Court’s order. *See, e.g.* Docket No. 81.
21 Plaintiff’s response lacks legal analysis and delivers no real attempt to establish substantial
22 justification or harmlessness. Docket No. 89.

23 *i. Appropriate Sanctions*

24 The district court has great latitude in imposing sanctions under Rule 37. *Lew v. Kona*
25 *Hosp.*, 754 F.2d 1420, 1425–26 (9th Cir. 1985). Federal Rule of Civil Procedure 37(b) provides
26 the court with a wide range of sanctions for a party’s failure to comply with the Court’s orders.
27 “Discovery sanctions serve the objectives of discovery by correcting for the adverse effects of
28 discovery violations and deterring future discovery violations from occurring.” *Taylor v. Illinois*,

1 484 U.S. 400, 425 (1988). Rule 37 authorizes dismissal of a complaint, entry of default judgment,
2 and awards of fees and costs as discovery sanctions. However, striking a party's pleadings is a
3 harsh penalty and “should be imposed as a sanction only in extreme circumstances.” *Thompson*
4 *v. Housing Authority of the City of Los Angeles*, 782 F.2d 829, 831 (9th Cir.1986).

5 Due process requires that the sanctions for discovery abuses be just and that the sanctions
6 relate to the claims which were at issue in the relevant discovery order at issue. *Kyle v. R.J.*
7 *Reynolds Indus., Inc.*, 709 F.2d 585, 591 (9th Cir.1983). In deciding whether to grant a motion for
8 terminating sanctions under Rule 37(b)(2)(A), the Court should consider five factors: “(1) the
9 public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket;
10 (3) the risk of prejudice to the other party; (4) the public policy favoring disposition of cases on
11 their merits; and (5) the availability of less drastic sanctions.” *Hester v. Vision Airlines, Inc.*, 687
12 F.3d 162, 1169 (9th Cir. 2012). Where a court order is violated, the first two factors support
13 sanctions and the fourth factor cuts against them. Therefore, the third and fifth factors are generally
14 decisive in the inquiry. *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997); *Computer Task*
15 *Group, Inc.*, 364 F.3d at 1115.

16 *i. The Risk of Prejudice to the Other Party*

17 The failure to produce discovery as ordered is considered sufficient prejudice to the
18 opposing party. *Payne*, 121 F.3d at 508 (internal citation omitted). The actions of an opposing
19 party that impair the ability to go to trial or interfere with the rightful decision of the case are
20 prejudicial. *Id.* Where a party fails to tender discovery until the eve of the discovery cut-off or
21 after the discovery cut-off, the opposing party is foreclosed of any meaningful opportunity to
22 follow up on that information or to incorporate it into its litigation strategy. *Id.*

23 Here, Plaintiff has refused to meaningfully participate in discovery. Plaintiff has failed to
24 produce thirteen discovery documents, all which were listed in the Court’s order to compel,
25 including her therapy session notes, medical documents, documents to support her claim of lost
26 commissions, tax returns and employment documentations, social security personal earnings, and
27 transportation documents. Docket No. 92 at 3-6. Not only did she fail to provide this information
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1 during the discovery period, she also failed to comply with the Court's order directing her to
2 provide the information.

3 In no uncertain terms, the Court ordered Plaintiff to produce documents in response to
4 Defendant's request for production and/or to supplement her responses to fully describe the search
5 she conducted. Docket No. 75 at 4. In granting Defendant's motion to compel in its entirety, the
6 Court ordered Plaintiff to provide the facts and documents United requested, including the facts
7 and documents related to Plaintiff's responses to United's first set of interrogatories. *Id.* at 3.
8 Clearly, Plaintiff's failure to produce discovery is prejudicial.

9 *ii. The Availability of Less Drastic Sanctions*

10 The Court must consider the availability of less drastic sanctions before imposing a case-
11 dispositive sanction. The Ninth Circuit looks to (1) whether the Court considered lesser sanctions;
12 (2) whether it tried lesser sanctions; and (3) whether it warned the recalcitrant party about the
13 possibility of case-dispositive sanctions. *See, e.g., Hester*, 687 F.3d at 1170. The Court may
14 consider all the offending party's discovery conduct when making its determination of the
15 appropriate sanction. *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 947 (9th Cir. 1995). However,
16 for a case-dispositive sanction to be appropriate, the disobedient party's conduct must be due to
17 willfulness, fault, or bad faith. *Id.* at 946–47.

18 In this case, Plaintiff has failed to provide the required information and documentation.
19 While Plaintiff's production has been flawed, it does not yet rise to the level of willfulness or bad
20 faith. Plaintiff has yet to demonstrate a pattern of failures to comply that would warrant the
21 harshness of a case-dispositive sanction at this juncture. Further, a less drastic sanction is available
22 and, in this instance, a more appropriate measure to correct the adverse effects of Plaintiff's
23 discovery violations.

24 *iii. Exclusion Sanctions*

25 In the alternative to terminating sanctions, Defendant submits that the Court should order
26 preclusion sanctions for Plaintiff's arguments and evidence of alleged emotional distress, alleged
27 loss of earnings, and alleged loss of earning ability. Docket No. 81 at 3.

1 In practice, exclusion sanctions are generally limited to “extreme situations.” *See, e.g., City*
2 *& County of San Francisco v. Tutor-Saliba*, 218 F.R.D. 219, 222 (N.D. Cal. 2003). Courts are
3 leery of imposing the harsh sanction of exclusion absent a significant possibility of prejudice due
4 to the untimeliness of the disclosure. *Silvagni*, 320 F.R.D. at 243 & n.6. “Lesser sanctions and
5 other measures are generally more appropriate than evidence preclusion when the disclosure is
6 provided during the discovery period and the delay can be remedied during the existing discovery
7 period or with a limited and brief extension of discovery.” *Silvagni*, 320 F.R.D. at 243 (quoting
8 *Jones v. Wal-Mart Stores, Inc.*, 2016 WL 1248707, at *7 (D. Nev. Mar. 28, 2016)).

9 Additionally, when an exclusion sanction is tantamount to dismissal of a claim, the court
10 must also consider whether the non-compliance involved willfulness, fault, or bad faith. *R&R*
11 *Sails, Inc. v. Insurance Co. of Penn.*, 673 F.3d 1240, 1247 (9th Cir. 2012). Although a finding of
12 willfulness or bad faith is not otherwise required, willfulness or bad faith is a factor in deciding
13 the appropriate level of sanctions to impose. *Jackson v. United Artists Theatre Circuit, Inc.*, 278
14 F.R.D. 586, 594 (D. Nev. 2011).

15 Here, the Court finds three reasons exclusionary sanctions are inappropriate. First, the
16 current posture of the case suggests that exclusionary sanctions at this point would be preemptive.
17 The deadline for discovery was November 9, 2018, and the deadline for dispositive motions is
18 December 10, 2018. Docket No. 61 at 3. Second, Plaintiff’s violation of the Court order, while
19 frustrating to the discovery purpose, does not, at this point, rise to the level of bad faith. Finally,
20 in this case, an exclusion sanction of Plaintiff’s argument and evidence concerning her emotional
21 distress, loss of earnings, and earning ability would be tantamount to the dismissal of Plaintiff’s
22 claims in those areas. In light of the above, the Court finds exclusionary sanctions are
23 inappropriate.

24 Nonetheless, Plaintiff’s conduct has required the Court to intervene yet again in the
25 discovery process to manage her compliance. The Court’s order to compel discovery was clear
26 and complete; however, Plaintiff failed to comply with the order despite warnings of the
27 consequences of doing so. The Court, therefore, sanctions Plaintiff, and awards Defendant
28 reasonable costs and attorneys’ fees incurred in preparing and filing the motion for sanctions.

1 The Court will allow Plaintiff one final opportunity to provide the outstanding discovery
2 and supplement her interrogatory responses. Plaintiff shall, no later than November 26, 2018,
3 provide the documents and supplement her interrogatory responses as ordered in Docket No. 75.
4 Failure to do so may result in further sanctions.

5 *iv. Attorneys' Fees*

6 Defendant asks the Court to order Plaintiff to pay its reasonable attorneys' fees and costs
7 in bringing the instant motion. Docket No. 81 at 3. Federal Rule of Civil Procedure 37(b)
8 authorizes a court to grant reasonable expenses, including attorneys' fees, caused by a party's
9 failure to comply with a discovery order, "unless the court finds that the failure was substantially
10 justified or that other circumstances make an award of expenses unjust." *See Hyde & Drath v.*
11 *Baker*, 24 F.3d 1162, 1171 (9th Cir.1994). Here, there is nothing to suggest Plaintiff's failure was
12 substantially justified or that there are extenuating circumstances making an award of expenses
13 unjust.

14 Accordingly, Defendant's motion for sanctions, Docket No. 81, is **GRANTED** in part and
15 **DENIED** in part according to the provisions herein. The Court sanctions Plaintiff in the amount
16 of Defendant's reasonable attorneys' fees and costs incurred in preparing and filing the motion for
17 sanctions.

18 IT IS FURTHER ORDERED as follows:

- 19 1. Defendant shall submit an affidavit of reasonable attorneys' fees and costs, incurred in
20 bringing this motion no later than December 7, 2018. The memorandum shall provide a
21 reasonable itemization and description of work performed, identify the attorneys
22 performing the work, the customary fee for the attorneys for such work, and the experience,
23 reputation, and ability of the attorneys performing the work.
- 24 2. Plaintiff shall have until **December 14, 2018**, to file a responsive memorandum addressing
25 the reasonableness of the costs and fees sought, and any equitable considerations deemed
26 appropriate for the court to consider in determining the amount of costs and fees which
27 should be awarded.

1 3. Plaintiff must, no later than November 26, 2018, comply in full with the Court's order at
2 Docket No. 75.

3 IT IS SO ORDERED.

4 Dated: November 16, 2018.

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Nancy J. Koppe
United States Magistrate Judge
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